Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119, and 15-191

In the Supreme Court of the United States

DAVID A. ZUBIK, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD, FIFTH, TENTH, AND DISTRICT OF COLUMBIA CIRCUITS

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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(Additional Captions Listed on Inside Cover)

PRIESTS FOR LIFE, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

EAST TEXAS BAPTIST UNIVERSITY, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

SOUTHERN NAZARENE UNIVERSITY, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

GENEVA COLLEGE, PETITIONER

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

In 2012, before the contraceptive-coverage requirement took effect, the Departments of Health and Human Services (HHS), Labor, and the Treasury pledged to develop an accommodation that would "effectively exempt" objecting religious organizations from any obligation to cover contraceptive services, while still ensuring that women employed by those organizations receive the full health coverage to which they are entitled by law. 77 Fed. Reg. 16,503 (Mar. 21, 2012). After consulting with religious organizations, insurers, and other stakeholders, the Departments engaged in three rounds of notice-and-comment rulemaking to develop and refine regulations achieving those two goals. The rulemaking proceedings generated hundreds of thousands of public comments

The accommodation at issue here is the result of that comprehensive administrative process, and it reflects the Departments' expertise in the complex system of federal and state laws governing the myriad health coverage arrangements in the marketplace. The accommodation furthers the compelling interest in ensuring that women covered by every type of health plan receive full and equal health coverage, including contraceptive coverage. At the same time, it goes to great lengths to separate objecting employers from the provision of contraceptive coverage and to minimize any burden on religious exercise. Gov't Br. 53-88. Religious organizations providing coverage to hundreds of thousands of people have now invoked the accommodation to opt out of the contraceptive-coverage requirement. *Id.* at 18-19; see p. 16, *infra*.

This Court's order of March 29, 2016, directed the parties to address alternative procedures by which

"contraceptive coverage may be obtained by petitioners' employees, through petitioners' insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage." Order 1. In addressing only "[p]etitioners with insured plans," *ibid.*, the order correctly anticipates that the alternative it posits would not work for the many employers with self-insured plans, which use third-party administrators (TPAs) rather than insurers, and which make up a substantial portion of the employers that have invoked the accommodation.

For employers with insured plans, the Court's order describes an arrangement very similar to the existing accommodation. The accommodation already relieves petitioners of any obligation to provide contraceptive coverage and instead requires insurers to provide coverage separately. The only difference is the way the accommodation is invoked. Currently, an employer that chooses to opt out by notifying its insurer (rather than HHS) must use a written form certifying its religious objection and eligibility for the accommodation. The Court's order posits an alternative procedure in which the employer could opt out by asking an insurer for a policy that excluded contraceptives to which it objects. Order 1-2. That request would not need to take any particular form, but the employer and the insurer would be in the same position as after a self-certification: The employer's obligation to provide contraceptive coverage would be extinguished, and the insurer would instead be required to provide the coverage separately. *Ibid.*

Because insurers have an independent statutory obligation to provide contraceptive coverage, the ac-

commodation for employers with insured plans could be modified to operate in the manner described in the Court's order—but only at a real cost to its effective implementation. The self-certification process was adopted with broad support from commenters because it provides clarity and certainty for all parties whose rights and duties are affected by the accommodation, including the objecting employers. A requirement that an employer state in writing its religious objection and eligibility for an exemption is a minimally intrusive process, and petitioners have never suggested an alternative arrangement like the one posited in the Court's order. The Court thus should not require any change to the self-certification process.

If, however, the Court determines that the existing process for invoking the accommodation must be modified in some respect in light of petitioners' religious objections, it should make clear that the government may continue to require the relevant insurers to provide separate contraceptive coverage to petitioners' employees in accordance with the other provisions of the current regulations. A decision requiring a modification to the accommodation while leaving open the possibility that even the arrangement as so modified might itself be deemed insufficient would lead to years of additional litigation, during which tens of thousands of women would likely continue to be denied the coverage to which they are legally entitled.

A. Except For The Self-Certification Process, The Existing Accommodation For Employers With Insured Plans Already Contains All Of The Elements Posited In This Court's Order

1. The Court's order posits an arrangement in which petitioners with insured plans "would have no

legal obligation to provide * * * contraceptive coverage" and "would not pay for such coverage," and in which petitioners' insurers would instead "separately notify petitioners' employees that the insurance compan[ies] will provide cost-free contraceptive coverage, and that such coverage is not paid for by petitioners and is not provided through petitioners' health plan." Order 2. The present accommodation for employers with insured plans already has each of those features.

First, the accommodation extinguishes an objecting employer's obligation to provide contraceptive coverage and instead assigns the relevant insurer "sole responsibility for providing such coverage." 45 C.F.R. 147.131(c)(1)(i). The employer is thus excused from its obligations even if the insurer fails to provide the coverage. 45 C.F.R. 147.131(e)(2).

Second, the accommodation ensures that the employer does not pay for the separate contraceptive coverage. "With respect to payments for contraceptive services," the insurer "may not * * * impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization" or the "group health plan," and it "must segregate premium[s]" paid by the employer "from the monies used to provide payments for contraceptive services." 45 C.F.R. 147.131(c)(2)(ii). The employer thus does not subsidize the coverage in any way.

Third, contraceptive coverage is not provided through the employer's health plan. To the contrary, the insurer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the [employer's] group health plan," and must instead "[p]rovide separate payments" for contraceptive services. 45 C.F.R.

147.131(c)(2)(i). Those payments "are not a group health plan benefit." 78 Fed. Reg. 39,876 (July 2, 2013).

Fourth, the insurer must provide employees with "written notice of the availability of separate payments for contraceptive services" that is "separate from" any materials distributed in connection with the employer's plan. 45 C.F.R. 147.131(d). "The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services." *Ibid.* Thus, information about contraceptive coverage is not provided to employees as part of any communication about their employer-provided coverage. It is entirely separate.

2. Although petitioners have stated that they regard the accommodation as "hijack[ing]" their health plans, *e.g.*, *Zubik* Br. 53, they have not denied that the accommodation for insured plans already has each of these objective features—including the express requirements ensuring that the separate contraceptive coverage provided by insurers is *not* part of the employers' health plans. The only difference between the existing accommodation and the arrangement described in the Court's order is thus the way an eligible employer communicates its decision to opt out of the obligation to provide contraceptive coverage.

Under the accommodation regulations, an employer may opt out in either of two ways: It may send a written notice to HHS, or it may self-certify its eligibility "in the form and manner specified by the Secretary of Labor" and provide a copy to its insurer. 45 C.F.R. 147.131(b)(3) and (c)(1); see Gov't Br. 13-15. If the employer chooses to notify HHS—an option made available in response to this Court's interim order in

Wheaton College v. *Burwell*, 134 S. Ct. 2806 (2014)—its notice must contain specified information, but need not use any form. 45 C.F.R. 147.131(c)(1)(ii); see Gov't Br. 14-15. HHS then notifies the insurer of its obligation to provide separate contraceptive coverage. If the employer instead chooses to notify its insurer, the "form and manner" of the self-certification currently specified by the Secretary of Labor is a simple form. See U.S. Dep't of Labor, *EBSA Form 700* (Aug. 2014), http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf.

The self-certification form contains spaces for the name and contact information of the employer and the individual completing the form on its behalf. *EBSA Form 700*, at 1. Apart from that information, the form requires only the following certification of the employer's religious objection and eligibility to opt out:

> I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)) that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered.

Ibid. The reverse side of the form contains a notice to TPAs that receive the form from employers with self-insured plans. *Id.* at 2. That portion of the form does not apply to employers with insured plans.

This Court's order contemplates a modified arrangement in which an objecting employer with an insured plan would not be required to furnish any written notification, either to HHS or to its insurer. Instead, employers could opt out by "inform[ing] their insurance compan[ies] that they do not want their health plan[s] to include contraceptive coverage of the

type to which they object on religious grounds." Order 2. The insurers—"aware that [the employers] are not providing certain contraceptive coverage on religious grounds"—would then be required to provide separate contraceptive coverage to the affected employees and beneficiaries. *Ibid.*

B. The Court Should Not Require Any Change To The Self-Certification Process

Requiring a party seeking an exemption to certify its eligibility in writing is a common and appropriate way to effectuate a religious accommodation. The self-certification process at issue here was adopted with broad support from commenters, including many religious organizations, because it provides clarity and certainty to all parties whose rights and duties are affected by the accommodation. Petitioners have not objected to certifying, in writing, that they object to contraceptives and are eligible for the accommodation. Nor have they ever suggested an alternative procedure like the one posited in the Court's order.

1. Self-certification is a minimally intrusive process that provides clarity for all parties whose rights and duties are affected by the accommodation

a. Petitioners seek an exemption from the generally applicable requirement that "group health plan[s]" established by employers include coverage for contraceptive services. 42 U.S.C. 300gg-13(a)(4). Petitioners with insured plans also seek to exempt the insurance companies with which they contract from the separate requirement that insurers "offering group * * * health insurance coverage" include contraceptive coverage in their group health insurance policies. *Ibid.* To grant those exemptions, the accommodation

regulations necessarily must alter the legal rights and duties of objecting employers, the insurance companies with which they contract, and the affected employees and their beneficiaries.

When an eligible employer opts out, the regulations extinguish the employer's obligation to provide contraceptive coverage. 45 C.F.R. 147.131(c)(1). The regulations likewise extinguish the relevant insurer's obligation to include contraceptive coverage in the group policy issued for the plan, and instead require the insurer to provide separate payments for contraceptive services entirely outside the plan and in compliance with strict segregation requirements. 45 C.F.R. 147.131(c)(2). As a result, employees and beneficiaries must look only to the insurer to provide payments for contraceptive services and resolve coverage disputes; they have no recourse against the employer or the plan. 45 C.F.R. 147.131(c) and (e)(2).

b. The Departments first adopted the self-certification process after two rounds of notice and public comment. 78 Fed. Reg. at 39,875 (regulations); see 78 Fed. Reg. 8462 (Feb. 6, 2013) (notice of proposed rulemaking); 77 Fed. Reg. at 16,504 (advance notice of proposed rulemaking). As the Departments explained, self-certification is a simple, minimally intrusive process that provides clarity and certainty for all parties affected by the accommodation.

First, requiring a written notification of the employer's eligibility and religious objection serves to verify the employer's sincerity without "undue inquiry" into its religious beliefs or its "character, mission, or practices." 78 Fed. Reg. at 39,875; cf. *University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1342-1345 (D.C. Cir. 2002) (explaining that an organization's

public representations of its character and beliefs are the most appropriate and least intrusive measure of the sincerity of a claim for a religious exemption).

Second, the use of a simple and standard certification form eliminates the risk of intrusive back-and-forth between insurers and employers. When an insurer receives a self-certification, it "may not require any further documentation" to establish the employer's eligibility for the accommodation. 45 C.F.R. 147.131(c)(1)(i). An insurer that "relies reasonably and in good faith" on a self-certification to provide separate contraceptive coverage is therefore deemed to comply with its legal obligations even if it turns out that the employer was not eligible for the accommodation. 45 C.F.R. 147.131(e)(1). By contrast, if employers were permitted to opt out simply by informally requesting policies excluding contraceptives, insurers concerned about their own obligations could demand additional information to verify the employers' sincerity and their eligibility for an exemption.

Third, the self-certification procedure clearly documents an employer's decision to opt out. The employer must "make the self-certification available for examination upon request so that regulators, issuers, * * * and plan participants and beneficiaries may verify that [the] organization has qualified for an accommodation." 78 Fed. Reg. at 8462; see 45 C.F.R. 147.131(b)(3). That procedure ensures that the religious employer is not held legally responsible if the insurer fails to provide the required coverage or an employee disputes a particular coverage decision.

c. During the rulemaking proceedings, interested parties—including many religious organizations—supported the self-certification procedure for precise-

ly these reasons. For example, while it initially expressed concerns about other aspects of the accommodation, the Catholic Health Association praised "the simplicity and clarity of the self-certification process."[1] Other organizations agreed that the Departments were "right to rely on self-certification."[2]

Requiring a written certification is a common and appropriate means of effectuating a religious accommodation—particularly where, as here, that accommodation affects the rights and duties of third parties. Many accommodations rely on similar certifications to confirm that persons seeking a religious exemption are eligible to do so and are acting based on sincere religious beliefs.[3] When a religious adher-

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[1] Catholic Health Ass'n Comment 7 (Apr. 4, 2013), https://www.regulations.gov/#!documentDetail;D=CMS-2012-0031-133158; see, *e.g.*, Wheaton Franciscan Healthcare Comment 2 (Apr. 8, 2013), https://www.regulations.gov/#!documentDetail;D=CMS-2012-0031-80285 ("We appreciate and support the simplicity and clarity of the self-certification process.").

[2] Institutional Religious Freedom Alliance Comment 5 (Mar. 28, 2013), https://www.regulations.gov/#!documentDetail;D=CMS-2012-0031-66015; see, *e.g.*, Ass'n of Jesuit Colleges & Univs. Comment 3-4 (June 19, 2012), https://www.regulations.gov/#!documentDetail;D=CMS-2012-0031-12033.

[3] See, *e.g.*, *Serfass* v. *United States*, 420 U.S. 377, 379 (1975) (describing "the form [used by] conscientious objectors" to the draft); U.S. Dep't of the Treasury, *Form 8274* (Aug. 2014), https://www.irs.gov/pub/irs-pdf/f8274.pdf (certification filed by certain religious employers to opt out of Social Security and Medicare taxes); Iowa Dep't of Pub. Health, *Certificate of Blood Lead Testing Exemption for Religious Reasons*, https://idph.iowa.gov/Portals/1/Files/LPP/exemption.pdf (last visited Apr. 11, 2016) (certification for exemption from blood-testing requirement); Mass. Dep't of Transitional Assistance, *Religious Exemption Certification Statement* (Oct. 2014), http://webapps.ehs.state.ma.us/DTA/PolicyOnline/olg%20docs/

ent seeks to invoke an exemption from a generally applicable requirement that would otherwise burden its exercise of religion (such as the requirement to cover contraceptives), a procedure requiring that it certify in writing its objection and its eligibility for the exemption should not be regarded as a substantial burden cognizable under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*

Accordingly, if the arrangement posited in the Court's order would not impose a substantial burden on the exercise of religion—as we think it surely would not—then the incremental requirement that petitioners communicate their religious objection in writing rather than through an informal request should not alter that conclusion. Or, putting the same point in terms of RFRA's least-restrictive-means test, the arrangement posited in the Court's order should not be regarded as materially less restrictive than the existing accommodation. That is particularly so given the important role of a written notification in the implementation of the accommodation, and the fact that an employer that would prefer not to use the self-certification form may instead communicate its objection to HHS, without using any form.

2. Petitioners have never suggested that an alternative procedure like the one posited in the Court's order would allay their religious objections

In nearly five years of administrative proceedings and litigation, petitioners have never suggested that

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form/13/ebt-16.pdf (certification for exemption from photographic identification requirement); Conn. Dep't of Pub. Health, *Religious Exemption Certification Statement* (Apr. 2011), http://www.ct.gov/dph/lib/dph/infectious_diseases/immunization/exemptions/rel_exempt.pdf (certification for exemption from immunization requirement).

an arrangement like the one posited in the Court's order would allay their religious objections. To the contrary, they have consistently articulated objections that would apply equally to such an arrangement.

First, numerous petitioners have submitted declarations and affidavits objecting to a system in which their employees receive separate contraceptive coverage "by virtue of the employees' participation in an insurance plan" offered by petitioners. J.A. 77; see, *e.g.*, J.A. 108, 115, 368, 373, 378, 383, 388, 393, 398, 404, 410, 1008, 1183, 1196, 1208, 1396.[4] The same objection applies to the approach posited in the Court's order.

Second, the *Zubik* petitioners have stated (Br. 36) that "they may hire an insurance company only if it will not provide their students and employees" with contraceptive coverage. But under the approach posited in this Court's order, as under the existing accommodation, separate "contraceptive coverage [would] be obtained by petitioners' employees through petitioners' insurance companies." Order 1.

Third, petitioners have objected to transmitting the self-certification form to insurers or sending a written notice of their objection to HHS. See, *e.g.*, *Zubik* Br. 35-37; *ETBU* Br. 41-46. But they have not objected to the mere act of certifying in writing that they are eligible for the accommodation, or to sending such a certification to their insurers. Indeed, counsel for the *ETBU* petitioners emphasized at oral argument that

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[4] See also J.A. 511-512 (rulemaking comments stating that "[t]here is no material difference" between the direct purchase of contraceptive coverage and a system in which an employer's purchase of an insurance policy without such coverage "automatically results in insurance coverage for the objectionable services" outside the employer's policy).

his clients would "fill out any form [the government] wanted" if the result was that the insurers did *not* provide separate contraceptive coverage. Tr. 18. Instead, petitioners object to sending the self-certification or a notice to HHS because, if an employer opts out by taking either step, the government requires the relevant insurer to provide separate contraceptive coverage to the affected employees and beneficiaries.[5] But under the approach posited in the Court's order, an insurer would have the same legal obligations following an act by the objecting employer—that act would just be an informal request for a policy excluding contraceptives to which the employer objects on religious grounds rather than a written self-certification or notice. Order 1-2.

Accordingly, at no time in these lengthy proceedings have petitioners ever suggested that an alternative like the one posited in the Court's order would allay their religious objections to the accommodation, and they have never urged such an arrangement as a less-restrictive means of advancing the governmental interests at stake. To the contrary, petitioners have taken pains *not* to endorse such an alternative. For example, counsel for the *Zubik* petitioners was asked at oral argument whether petitioners could accept any procedure in which their insurers provided separate contraceptive coverage to petitioners' employees and their beneficiaries. Tr. 41-44. Counsel identified only one possibility, stating that if the government chose a single insurer such as Aetna "to provide contraceptive

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[5] See J.A. 97-98 (declaration objecting to a system in which an employer's action "trigger[s] an obligation on the part of the [insurer or] TPA to provide or obtain the objectionable coverage"); see also, *e.g.*, J.A. 125, 232-233, 321, 651, 741, 804-805.

coverage *to all women in this country*" at the government's expense, then petitioners "probably" would not object to Aetna providing separate coverage to their employees even if one or more petitioners also "happened to use Aetna" to provide the employees' other health coverage. Tr. 43 (emphasis added).

We do not address that alternative here because—in addition to its other shortcomings—it is not an arrangement in which petitioners' employees would obtain contraceptive coverage "through petitioners' insurance companies," along with the rest of the employees' health coverage. Order 1.[6] But counsel's responses at oral argument confirm that the objections petitioners have asserted thus far would not be allayed by eliminating any particular feature of the existing procedure for invoking the accommodation.

C. Although The Court Should Not Require A Change, The Accommodation For Employers With Insured Plans Could, At Some Cost, Be Modified To Operate In The Manner Posited In The Court's Order

1. Requiring an employer seeking an exemption from the contraceptive-coverage requirement to provide written notice plays an important role in implementing the accommodation, and eliminating that requirement would impose real costs on the parties whose rights and duties are affected—including objecting employers. But the accommodation for employers with insured plans could be modified to oper-

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[6] The approach proposed by petitioners is not a viable alternative to the accommodation because it would impose logistical obstacles on women seeking contraceptive services—precisely the sort of barriers that Congress sought to eliminate. It is also inconsistent with federal and state insurance law. Gov't Br. 73-85.

ate in the manner posited in the Court's order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage.

Insurers have an independent statutory obligation to provide contraceptive coverage. 42 U.S.C. 300gg-13(a)(4). Under the accommodation, an insurer must satisfy that obligation by providing separate payments for contraceptive services outside the employer's plan, instead of by including contraceptive coverage in the group insurance policy for the plan. 45 C.F.R. 147.131(c). That change in the insurer's legal obligations currently arises when the insurer receives a self-certification form or a notification that an employer has opted out by contacting HHS. *Ibid.* In theory, however, the government could provide that the same legal obligations arise following any request by an eligible employer with an insured plan for an insurance policy that excluded contraceptives to which the employer objects on religious grounds.[7]

2. This Court's order sought briefing on alternative arrangements for "[p]etitioners with insured plans." Order 1. In so doing, the order correctly

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[7] Five petitioners have insured plans: Catholic University, Oklahoma Baptist University, Oklahoma Wesleyan University, Geneva College, and Priests for Life. *Zubik* Pet. App. 20a; *RCAW* Pet. App. 14a-15a; *Little Sisters* Pet. App. 35a-36a. Four petitioners have sought relief in connection with the health insurance policies they arrange for their students: Catholic University, Southern Nazarene University, Oklahoma Baptist University, and Geneva College. *Ibid.* The Court's order and this brief focus on insured employee plans, but the accommodation for colleges and universities that arrange fully insured coverage for their students works the same way, see 45 C.F.R. 147.131(f), and could likewise be modified to operate in the manner posited in the Court's order.

anticipated that the alternative process it posited would not work for the many employers with self-insured plans. Numerous employers with self-insured plans have availed themselves of the accommodation using the written notification process. As of 2014, for example, self-insured plans covering more than 600,000 people had done so. Gov't Br. 18-19 & n.7.

If an employer has a self-insured plan, the statutory obligation to provide contraceptive coverage falls only on the plan—there is no insurer with a preexisting duty to provide coverage. 42 U.S.C. 300gg-13(a)(4). Accordingly, to relieve self-insured employers of any obligation to provide contraceptive coverage while still ensuring that the affected women receive coverage without the employer's involvement, the accommodation establishes a mechanism for the government to designate the employer's TPA as a "plan administrator" responsible for separately providing the required coverage under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* That designation is made by the government, not the employer, and the employer does not fund, control, or have any other involvement with the separate portion of the ERISA plan administered by the TPA. Gov't Br. 16-17 & n.4, 38-39.[8]

The government's designation of the TPA must be reflected in a written plan instrument. 29 U.S.C. 1002(16)(A)(i). To satisfy that requirement, the accommodation relies on either (1) a written designation

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[8] If an employer has an ERISA-exempt church plan, the government cannot designate the TPA as a plan administrator under ERISA. Instead, the government offers to compensate the TPA if it provides separate contraceptive coverage voluntarily, outside the employer's plan. Gov't Br. 17-18, 38 & n.15.

sent by the government to the TPA, which requires the government to know the TPA's identity, or (2) the self-certification form, which the regulations treat as a plan instrument in which the government designates the TPA as a plan administrator. Gov't Br. 16 n.4. There is no mechanism for requiring TPAs to provide separate contraceptive coverage without a plan instrument; self-insured employers could not opt out of the contraceptive-coverage requirement by simply informing their TPAs that they do not want to provide coverage for contraceptives. As we have explained, however, any employer that objects to a feature of the accommodation unique to self-insured plans can switch to an insured plan. Gov't Br. 39 n.16.

D. This Court Should Definitively Resolve Petitioners' Challenges To The Accommodation

If this Court concludes that some aspect of the present opt-out procedure for insured plans must be modified to adequately meet petitioners' religious objections to the contraceptive-coverage requirement, it should make clear that the government may require petitioners' insurers to provide separate contraceptive coverage to petitioners' employees in accordance with the other provisions of the existing regulations. Petitioners' challenge to that basic feature of the accommodation is squarely presented here, and it affects the legal rights of numerous nonprofit and for-profit employers that have challenged the accommodation—as well as tens of thousands of women who presently are not receiving the health coverage to which they are entitled by law. We respectfully submit that the Court should definitively resolve the issue rather than allowing the current uncertainty to continue.

1. If the Court determines that some aspect of the present process for opting out renders the accommodation inadequate to meet petitioners' objections to the contraceptive-coverage requirement, it should hold that the Departments may not require compliance with the relevant requirements as a condition to invoking the accommodation. Depending on the nature of the defect the Court identifies, such a holding would apply either to the present self-certification form or to the discrete provisions of the regulations that require a written certification or notice.

The accommodation regulations require some form of written self-certification, but do not mandate any particular form. The regulations state that an employer must either provide a notice to HHS or "self-certify in the form and manner specified by the Secretary of Labor" and provide a copy of the self-certification to its insurer. 45 C.F.R. 147.131(b)(3) and (c)(1). If the Court were to conclude that some aspect of the present self-certification form is impermissible but that some other type of written certification would be acceptable, the Court should simply hold unenforceable the relevant aspects of the current form. No change to the regulations would be required, and the Secretary of Labor could simply specify a different means of self-certification—including one that did not require the use of a government form.

Alternatively, if the Court were to conclude that objecting employers may not be required to communicate their objections in writing at all, it should hold unenforceable those portions of the regulations that require an employer to provide a written notice to HHS or a self-certification to its insurer, and to main-

tain a copy of the notice or self-certification in its records. See 45 C.F.R. 147.131(b)(3) and (c)(1).[9]

2. In all cases, the Court should make clear that the government may, consistent with RFRA, require petitioners' insurers and TPAs to provide separate contraceptive coverage to petitioners' employees and their beneficiaries under the other provisions of the accommodation regulations.

In *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (*Hobby Lobby*), the Court took a different approach, holding the contraceptive-coverage requirement unenforceable as applied to the closely-held for-profit plaintiffs in that case based on the availability of the accommodation as a less-restrictive means, but without deciding whether the accommodation "complie[d] with RFRA for purposes of all religious claims." *Id.* at 2782. That approach is not available here. In *Hobby Lobby*, the Court concluded that the accommodation was consistent with "the religious beliefs asserted" by the plaintiffs in that case. *Id.* at 2782 n.40. Here, in contrast, the objections petitioners have consistently asserted over many years of administrative and judicial proceedings apparently would also apply to the alternative approach described in the Court's order. See pp. 12-13, *supra*. Such an alternative approach thus would not "accommodate[] the religious beliefs asserted in these cases." *Hobby Lobby*, 134 S. Ct. at 2782 n.40.

Even if petitioners themselves were to disclaim any challenge to the alternative the Court's order posits, many other nonprofit and for-profit employers have

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[9] The same requirements are contained in the parallel Treasury and Labor regulations. See 26 C.F.R. 54.9815-2713A(a)(3) and (c)(1); 29 C.F.R. 2590.715-2713A(a)(3) and (c)(1).

asserted parallel RFRA claims, and have likewise articulated objections to the accommodation that would appear to apply equally to such an alternative arrangement. A decision that held the present accommodation inadequate in some respect without fully resolving the RFRA challenges petitioners have presented would thus inevitably lead to uncertainty and continued litigation in the lower courts.

Such a decision would also likely result in the continued denial of health coverage to tens of thousands of women. In these cases alone, petitioners seek relief on behalf of organizations with more than 30,000 employees and students. Gov't Br. 20. Because of injunctions and other interim relief entered by the lower courts, none of the affected women are presently receiving the full and equal health coverage to which they are statutorily entitled. The dozens of other pending cases include employers that provide coverage to tens of thousands of additional women. *Ibid.* In all but a few of those cases, the affected women likewise are not receiving contraceptive coverage because the accommodation regulations have been enjoined pending this Court's resolution of the issue—even though eight courts of appeals have now held that the accommodation is consistent with RFRA. In order to avoid the continued denial of statutory rights to these tens of thousands of third parties, we respectfully request that the Court definitively resolve petitioners' challenges to the accommodation.

Respectfully submitted.

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